

1 RICHARD A. ERGO (# 110487)
2 CATHLEEN S. HUANG (# 219554)
3 BOWLES & VERNA LLP
4 2121 N. California Boulevard, Suite 875
Walnut Creek, California 94596
Telephone: (925) 935-3300
Facsimile: (925) 935-0371
Email: raergo@bowlesverna.com

5 Attorneys for Third Party Defendant
6 Worthington Industries, Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ANDREW SHALABY, an individual, and SONIA DUNN-RUIZ an individual.

Plaintiffs.

vs.

**IRWIN INDUSTRIAL TOOL COMPANY, THE
HOME DEPOT, INC., and DOES 2 through 100,
inclusive.**

Defendants.

Case No.: C06-07026 M-JJ

Judge Martin J. Jenkins

**DECLARATION OF JOSEPH TANCREDY
IN SUPPORT OF THIRD PARTY
DEFENDANT WORTHINGTON
INDUSTRIES, INC.'S REPLY BRIEF IN
SUPPORT OF MOTION TO TRANSFER
VENUE**

Date: September 25, 2007
Time: 9:30 a.m.
Ctrm: 11, 19th Floor

BERNZOMATIC.

Third Party Plaintiff,

vs.

WESTERN INDUSTRIES, INC.,
WORTHINGTON INDUSTRIES, AND ROES 2
through 100, inclusive.

Third Party Defendants.

I, Joseph Tancredy, declare as follows:

1. I am employed by St. Paul Traveler's Insurance Company, the liability insurance carrier

CASE NO.: C06-07026 MJJ

1

**DECLARATION OF JOSEPH TANCREDY IN SUPPORT OF WORTHINGTON'S REPLY BRIEF IN
SUPPORT OF MOTION TO TRANSFER VENUE**

1 for Irwin Industrial Tool Company. Bernzomatic is an unincorporated division of Irwin Tool Company.

2 I am familiar with the above-entitled action and the matters set forth in this Declaration are known to
3 me personally and, if called and sworn as a witness, I could competently testify thereto.

4 2. I understand that Worthington Industries, Inc. has filed a Motion to Transfer Venue from
5 the Northern District of California to the Southern District of California in San Diego.

6 3. If called as a witness, I am very willing to travel to the San Diego to testify at trial, if
7 necessary.

8
9
10
11 I declare under penalty of perjury under the laws of the State of California that the foregoing is
12 true and correct.

13 Executed this 10th day of August, 2007 at Walnut Creek, California.
14 September

15 
16 JOSEPH TANCREDY

1 Lowell T. Carruth, # 034065
2 McCormick, Barstow, Sheppard,
Wayte & Carruth LLP
3 P.O. Box 28912
4 5 River Park Place East
Fresno, CA 93720-1501
Telephone: (559) 433-1300
Facsimile: (559) 433-2300

(SPACE BELOW FOR FILING STAMP ONLY)

5
6 Attorneys for Third-Party Defendant
WESTERN INDUSTRIES, INC.

7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 ANDREW SHALABY, an individual, and
SONIA DUNN-RUIZ, an individual,

Case No. C 06-07026 MJJ

12 Plaintiffs,

STIPULATION AND ORDER
WITHDRAWING MOTION TO STRIKE
AND EXTENDING DUE DATE FOR
FILING RESPONSE TO THIRD-PARTY
COMPLAINT

13 v.
14 IRWIN INDUSTRIAL TOOL
COMPANY, THE HOME DEPOT, INC.,
and DOES 2 through 100, inclusive,

Judge: Martin J. Jenkins

15 Defendants.

16 BERNZOMATIC,

17 Cross-Complainant,

18 v.
19 WESTERN INDUSTRIES, INC.,
WORTHINGTON INDUSTRIES, AND
ROES 2 through 100, inclusive,

20 Cross-Defendants.

21
22 IT IS HEREBY STIPULATED by and between Defendant and Third Party Plaintiff
BERNZOMATIC, an Unincorporated Division of Irwin Industrial Tool Company, and Defendant
THE HOME DEPOT, INC. (collectively referred as "BERNZOMATIC") and Third Party
Defendant WESTERN INDUSTRIES, INC., ("WESTERN") and by and through their respective

23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
8010
8011
8012
8013
8014
8015
8016
8017
8018
8019
8020
8021
8022
8023
8024
8025
8026
8027
8028
8029
8030
8031
8032
8033
8034
8035
8036
8037
8038
8039
8040
8041
8042
8043
8044
8045
8046
8047
8048
8049
8050
8051
8052
8053
8054
8055
8056
8057
8058
8059
8060
8061
8062
8063
8064
8065
8066
8067
8068
8069
8070
8071
8072
8073
8074
8075
8076
8077
8078
8079
8080
8081
8082
8083
8084
8085
8086
8087
8088
8089
8090
8091
8092
8093
8094
8095
8096
8097
8098
8099
80100
80101
80102
80103
80104
80105
80106
80107
80108
80109
80110
80111
80112
80113
80114
80115
80116
80117
80118
80119
80120
80121
80122
80123
80124
80125
80126
80127
80128
80129
80130
80131
80132
80133
80134
80135
80136
80137
80138
80139
80140
80141
80142
80143
80144
80145
80146
80147
80148
80149
80150
80151
80152
80153
80154
80155
80156
80157
80158
80159
80160
80161
80162
80163
80164
80165
80166
80167
80168
80169
80170
80171
80172
80173
80174
80175
80176
80177
80178
80179
80180
80181
80182
80183
80184
80185
80186
80187
80188
80189
80190
80191
80192
80193
80194
80195
80196
80197
80198
80199
80200
80201
80202
80203
80204
80205
80206
80207
80208
80209
80210
80211
80212
80213
80214
80215
80216
80217
80218
80219
80220
80221
80222
80223
80224
80225
80226
80227
80228
80229
80230
80231
80232
80233
80234
80235
80236
80237
80238
80239
80240
80241
80242
80243
80244
80245
80246
80247
80248
80249
80250
80251
80252
80253
80254
80255
80256
80257
80258
80259
80260
80261
80262
80263
80264
80265
80266
80267
80268
80269
80270
80271
80272
80273
80274
80275
80276
80277
80278
80279
80280
80281
80282
80283
80284
80285
80286
80287
80288
80289
80290
80291
80292
80293
80294
80295
80296
80297
80298
80299
80300
80301
80302
80303
80304
80305
80306
80307
80308
80309
80310
80311
80312
80313
80314
80315
80316
80317
80318
80319
80320
80321
80322
80323
80324
80325
80326
80327
80328
80329
80330
80331
80332
80333
80334
80335
80336
80337
80338
80339
80340
80341
80342
80343
80344
80345
80346
80347
80348
80349
80350
80351
80352
80353
80354
80355
80356
80357
80358
80359
80360
80361
80362
80363
80364
80365
80366
80367
80368
80369
80370
80371
80372
80373
80374
80375
80376
80377
80378
80379
80380
80381
80382
80383
80384
80385
80386
80387
80388
80389
80390
80391
80392
80393
80394
80395
80396
80397
80398
80399
80400
80401
80402
80403
80404
80405
80406
80407
80408
80409
80410
80411
80412
80413
80414
80415
80416
80417
80418
80419
80420
80421
80422
80423
80424
80425
80426
80427
80428
80429
80430
80431
80432
80433
80434
80435
80436
80437
80438
80439
80440
80441
80442
80443
80444
80445
80446
80447
80448
80449
80450
80451
80452
80453
80454
80455
80456
80457
80458
80459
80460
80461
80462
80463
80464
80465
80466
80467
80468
80469
80470
80471
80472
80473
80474
80475
80476
80477
80478
80479
80480
80481
80482
80483
80484
80485
80486
80487
80488
80489
80490
80491
80492
80493
80494
80495
80496
80497
80498
80499
80500
80501
80502
80503
80504
80505
80506
80507
80508
80509
80510
80511
80512
80513
80514
80515
80516
80517
80518
80519
80520
80521
80522
80523
80524
80525
80526
80527
80528
80529
80530
80531
80532
80533
80534
80535
80536
80537
80538
80539
80540
80541
80542
80543
80544
80545
80546
80547
80548
80549
80550
80551
80552
80553
80554
80555
80556
80557
80558
80559
80560
80561
80562
80563
80564
80565
80566
80567
80568
80569
80570
80571
80572
80573
80574
80575
80576
80577
80578
80579
80580
80581
80582
80583
80584
80585
80586
80587
80588
80589
80590
80591
80592
80593
80594
80595
80596
80597
80598
80599
80600
80601
80602
80603
80604
80605
80606
80607
80608
80609
80610
80611
80612
80613
80614
80615
80616
80617
80618
80619
80620
80621
80622
80623
80624
80625
80626
80627
80628
80629
80630
80631
80632
80633
80634
80635
80636
80637
80638
80639
80640
80641
80642
80643
80644
80645
80646
80647
80648
80649
80650
80651
80652
80653
80654
80655
80656
80657
80658
80659
80660
80661
80662
80663
80664
80665
80666
80667
80668
80669
80670
80671
80672
80673
80674
80675
80676
80677
80678
80679
80680
80681
80682
80683
80684
80685
80686
80687
80688
80689
80690
80691
80692
80693
80694
80695
80696
80697
80698
80699
80700
80701
80702
80703
80704
80705
80706
80707
80708
80709
80710
80711
80712
80713
80714
80715
80716
80717
80718
80719
80720
80721
80722
80723
80724
80725
80726
80727
80728
80729
80730
80731
80732
80733
80734
80735
80736
80737
80738
80739
80740
80741
80742
80743
80744
80745
80746
80747
80748
80749
80750
80751
80752
80753
80754
80755
80756
80757
80758
80759
80760
80761
80762
80763
80764
80765
80766
80767
80768
80769
80770
80771
80772
80773
80774
80775
80776
80777
80778
80779
80780
80781
80782
80783
80784
80785
80786
80787
80788
80789
80790
80791
80792
80793
80794
80795
80796
80797
80798
80799
80800
80801
80802
80803
80804
80805
80806
80807
80808
80809
80810
80811
80812
80813
80814
80815
80816
80817
80818
80819
80820
80821
80822
80823
80824
80825
80826
80827
80828
80829
80830
80831
80832
80833
80834
80835
80836
80837
80838
80839
80840
80841
80842
80843
80844
80845
80846
80847
80848
80849
80850
80851
80852
80853
80854
80855
80856
80857
80858
80859
80860
80861
80862
80863
80864
80865
80866
80867
80868
80869
80870
80871
80872
80873
80874
80875
80876
80877
80878
80879
80880
80881
80882
80883
80884
80885
80886
80887
80888
80889
80890
80891
80892
80893
80894
80895
80896
80897
80898
80899
80900
80901
80902
80903
80904
80905
80906
80907
80908
80909<br

1 attorneys of record that the Motion To Strike Cross-Complainant's Third Party Complaint
2 Against Cross-Defendant, Western Industries, Inc., shall be withdrawn. WESTERN'S response
3 to BERNZOMATIC's Third Party Complaint shall be due twenty (20) days after the Court rules
4 on Defendant WORTHINGTON INDUSTRIES' Motion for Change of Venue.

5 Dated: September 5, 2007

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

7 By: /s/ Lowell T. Carruth

8 Lowell T. Carruth

9 Attorneys for Third-Party Defendant
WESTERN INDUSTRIES, INC.

10
11 Dated: August 27, 2007

KELLER, PRICE & MOORHEAD

12 By: /s/ J. Phillip Moorhead

13 J. Phillip Moorhead

14 Attorneys for Defendant and Third Party
15 Plaintiff BERNZOMATIC, an
16 Unincorporated Division of Irwin
17 Industrial Tool Company, and Defendant
18 THE HOME DEPOT, INC.

19 ORDER

20 The Court, having considered the above Stipulation and good cause appearing, hereby
21 orders that the Motion To Strike Cross-Complainant's Third Party Complaint Against Cross-
22 Defendant, Western Industries, Inc., shall be withdrawn. WESTERN'S response to
23 BERNZOMATIC's Third Party Complaint shall be due twenty (20) days after the Court rules on
24 Defendant WORTHINGTON INDUSTRIES' Motion for Change of Venue.

25 IT IS SO ORDERED.

26 Dated: 9/6/07

27 U.S. Magistrate Judge



28 03664/00161-1127231.v1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY, et al.,

No. C06-7026 MJJ

Clerk's Notice

IRWIN INDUSTRIAL TOOL COMPANY, et al.,

Defendant(s),

(Plaintiff is required to serve, and file proof of service with the Court, any party involved not listed on the attached proof of service.)

YOU ARE NOTIFIED THAT the Court has rescheduled the motion(s) currently on calendar for September 25, 2007 to Tuesday October 16, 2007 at 9:30 a.m. before the Honorable Martin J. Jenkins.

Please report to courtroom 11, on the 19th floor, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102.

Dated: September 14, 2007

FOR THE COURT,

Richard W. Wieking, Clerk

By: Alfred Amistoso
Alfred Amistoso
Courtroom Deputy

Please refer to Judge Jenkins' Standing Order located at www.cand.uscourts.gov for additional information. Pursuant to the Standing Order, the rescheduling of a hearing date for a motion does not change the date on which an opposition brief or reply brief is due; any opposition brief remains due not less than 21 days prior to the date of the *originally noticed* hearing and any reply brief is due not less than 14 days prior to the *originally noticed* hearing date.

1 RICHARD A. ERGO (# 110487)
2 CATHLEEN S. HUANG (# 219554)
3 BOWLES & VERNA LLP
4 2121 N. California Boulevard, Suite 875
5 Walnut Creek, California 94596
Telephone: (925) 935-3300
Facsimile: (925) 935-0371
Email: raergo@bowlesverna.com
chuang@bowlesverna.com

6 Attorneys for Third Party Defendant
Worthington Industries, Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

11 ANDREW SHALABY, an individual, and SONIA
DUNN-RUIZ an individual.

Case No.: C06-07026 MJJ

Judge Martin J. Jenkins

13 Plaintiffs,
14 vs.
15 IRWIN INDUSTRIAL TOOL COMPANY, THE
HOME DEPOT, INC., and DOES 2 through 100,
inclusive.

**THIRD PARTY DEFENDANT
WORTHINGTON INDUSTRIES, INC.'S
REQUEST TO APPEAR
TELEPHONICALLY AT CASE
MANAGEMENT CONFERENCE**

Date: October 2, 2007
Time: 2:00 p.m.
Ctrm: 11, 19th Floor

BERNZOMATIC.

Third Party Plaintiff,

vs.

22 | WESTERN INDUSTRIES, INC.,
WORTHINGTON INDUSTRIES, AND ROES 2
through 100, inclusive.

Third Party Defendants.

25 Third party defendant Worthington Industries, Inc. hereby requests that its attorney of record,
26 Cathleen S. Huang of Bowles & Verna LLP, be allowed to participate in the Case Management

Case 3:06-cv-07026-MJJ Document 68 Filed 09/20/2007 Page 2 of 2

1 Conference scheduled for Tuesday, October 2, 2007 at 2:00 p.m. before the Honorable Martin J.
2 Jenkins by telephone.

3 Dated: September 20, 2007

BOWLES & VERA LLP

4
5 By:
6


CATHLEEN S. HUANG
Attorneys for Third Party Defendant
WORTHINGTON INDUSTRIES, INC.

7
8
9 IT IS SO ORDERED.

10
11 Dated: September , 2007

12 HONORABLE MARTIN J. JENKINS

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Lowell T. Carruth, # 034065
2 McCormick, Barstow, Sheppard,
Wayte & Carruth LLP
3 P.O. Box 28912
4 5 River Park Place East
Fresno, CA 93720-1501
Telephone: (559) 433-1300
Facsimile: (559) 433-2300
Email: lowell.carruth@mccormickbarstow.com

(SPACE BELOW FOR FILING STAMP ONLY)

6 Attorneys for Third-Party Defendant
7 WESTERN INDUSTRIES, INC.

8
9 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10
11 ANDREW SHALABY, an individual, and
SONIA DUNN-RUIZ, an individual,

12 Plaintiffs,

13 v.

14 IRWIN INDUSTRIAL TOOL
15 COMPANY, THE HOME DEPOT, INC.,
and DOES 2 through 100, inclusive,

16 Defendants.

17 BERNZOMATIC,

18 Cross-Complainant,

19 v.

20 WESTERN INDUSTRIES, INC.,
WORTHINGTON INDUSTRIES, AND
ROES 2 through 100, inclusive,

21 Cross-Defendants.

Case No. CV 06-07026 MJJ

12
13
14
15
16
17
18
19
20
21
22
23
**THIRD-PARTY DEFENDANT WESTERN
INDUSTRIES, INC.'S REQUEST TO
APPEAR TELEPHONICALLY AT CASE
MANAGEMENT CONFERENCE**

Judge: Martin J. Jenkins
Date: October 2, 2007
Time: 2:00 p.m.
Courtroom: 11, 19th Floor

24 Third-Party Defendant WESTERN INDUSTRIES, INC., hereby requests that its attorney

25 of record, Lowell T. Carruth of McCormick, Barstow, Sheppard, Wayte & Carruth LLP, be

26 ///

27 ///

28 ///

1 allowed to participate in the Case Management Conference presently set for October 2, 2007 at
2 2:00 p.m. before the Honorable Martin J. Jenkins by telephone.

3 Dated: September 20, 2007

4 McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

5

6

7 By: /s/ Lowell T. Carruth

8 Lowell T. Carruth

9 Attorneys for Third-Party Defendant
WESTERN INDUSTRIES, INC.

10 IT IS SO ORDERED.

11 DATED: September ___, 2007

12 The Honorable Martin J. Jenkins
13 Judge of the U.S. District Court

14
15 03664/00161-1141311.v1

16

17

18

19

20

21

22

23

24

25

26

27

28

1 MICHAEL J. VEILUVA (State Bar No. 100419)
2 MARK D. EPSTEIN (State Bar No. 168221)
3 ALBORG, VEILUVA & EPSTEIN LLP
4 200 Pringle Avenue, Suite 410
Walnut Creek, CA 94596
Telephone: (925) 939-9880
Facsimile: (925) 939-9915

5 Attorneys for Plaintiffs
Andrew Shalaby and Sonia Dunn-Ruiz

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 ANDREW SHALABY and SONIA DUNN-
11 RUIZ,

Case No. C 06-07026 MJJ

12 Plaintiffs,

JOINT CASE MANAGEMENT STATEMENT AND PROPOSED ORDER

13 | VS.

Date: October 2, 2007

Time: 2:00 p.m.

Dept.: Courtroom 11, 19th Floor

Judge: The Hon. Martin J. Jenkins

Judge: The Hon. Martin J. Jenkins
Complaint filed: October 10, 2006

Complaint filed: October 10, 2006
Case Removed: November 9, 2006

AND RELATED THIRD PARTY CLAIMS

19 The parties to the above-entitled action jointly submit this Case Management Statement
20 and Proposed Order, and respectfully request that the Court adopt it as its Case Management
21 Order in this case.

DESCRIPTION OF THE CASE

This case stems from an incident that occurred on April 21, 2006, in which plaintiff Andrew Shalaby was injured while using a BernzOmatic brand MAPP Gas cylinder and torch.

1. Brief Description of the Events Underlying the Action

a. **Description of the Product at Issue in the Case**

Plaintiff Andrew Shalaby contends that he purchased a BernzOmatic brand MAPP Gas kit consisting of a MAPP gas cylinder and torch from a local hardware store, near his home in El

1 Cerrito, California in mid-2005. He further contends that sometime after he purchased the
2 original BernzOmatic kit, Mr. Shalaby purchased two replacement BernzOmatic MAPP Gas
3 cylinders to use when the original cylinder was depleted of fuel. MAPP gas is a mixture of
4 liquefied petroleum and methylacetylene-propadiene. MAPP gas is typically used for welding or
5 soldering applications due to its high combustion temperature of 5301° F (2927° C).

6 The products involved in this dispute are a yellow colored canister or "cylinder" which
7 contained the MAPP gas that served as the fuel, and a "torch" that emits a flame from the tip
8 when it is in use. The torch attached to the cylinder by screwing on to a threaded metal neck at
9 the top of the cylinder. When the torch is attached to the cylinder, the user ignites the torch by
10 pulling a trigger switch that is part of the torch assembly.

11 **b. The Parties**

12 The plaintiffs are Andrew Shalaby and his wife, Sonia Dunn-Ruiz. Mr. Shalaby contends
13 he was injured while using a MAPP gas cylinder and torch to light a campfire on or about April
14 21, 2006. The accident occurred in the presence of Ms. Dunn-Ruiz.

15 The named defendants in the operative (first amended) complaint are Irwin Industrial
16 Tool Company, of which BernzOmatic is an unincorporated division (hereinafter "Irwin"), and
17 the Home Depot, Inc. Upon answering the first amended complaint, Irwin filed a third party
18 complaint for indemnity against Western Industries, Inc. ("Western") and Worthington
19 Industries, Inc. ("Worthington"). In its third party complaint, Irwin alleges that during the time
20 periods relevant to this action, Irwin purchased MAPP gas cylinders exclusively from Western
21 and Worthington. Irwin alleges further that to the extent a BernzOamtic MAPP gas cylinder was
22 involved in the accident which forms the basis of plaintiffs' first amended complaint, said MAPP
23 gas cylinder was manufactured by either Western or Worthington.

24 **c. The Incident Underlying This Case**

25 Mr. Shalaby and his family, his wife Sonia Dunn-Ruiz and their two children, are avid
26 campers. The family owns a recreational vehicle which they use on a regular basis to tour the
27 western United States and park for overnight stays at designated campgrounds that accommodate

1 recreational vehicles. Prior to and including the evening of April 21, 2006, Mr. Shalaby
2 regularly used his BernzOmatic MAPP gas cylinder and torch to ignite wood campfires.

3 During the week of April 17, 2006, plaintiffs were vacationing at the "Campland on the
4 Bay," a recreational vehicle resort located near the water in San Diego, California. On the
5 evening of April 21, 2006, Mr. Shalaby contends he was severely injured when he activated the
6 trigger switch on the torch attached to the MAPP gas cylinder. Upon activating the trigger, Mr.
7 Shalaby contends he was engulfed by heated MAPP gas and flames that were emitted from the
8 product, which caused severe burns to his face, limbs, and extremities.

9 Ms. Dunn-Ruiz, was less than ten feet away from Mr. Shalaby during the occurrence of
10 the incident. She initially had her back turned to her husband, but upon hearing a loud noise, she
11 turned around to witness her husband on fire.

12 Two Campland employees who were on duty the evening of the incident, Warren Ratliff
13 and Randy Stephens, testified at their depositions that they viewed the cylinder and torch
14 following the incident, and that they were discarded a short time later because the captain of the
15 fire department suppression team who responded to the incident advised that the fire department
16 had no need for them.

17 d. **Plaintiffs Contend That The Incident Was Caused By a Defect In the MAPP
18 Gas Cylinder – Defendants and Third Party Defendants Deny Any Such
Defect**

19 Plaintiffs contend that Mr. Shalaby's injuries were caused by manufacturing and/or
20 design defects in the MAPP gas cylinder that was connected to the torch he was using to start the
21 campfire.

22 Plaintiffs are informed and believe that the defects in the cylinder resulted in a
23 phenomenon known in the scientific community as a "BLEVE," which is an acronym that stands
24 for "Boiling Liquid Expanding Vapor Explosion." A BLEVE occurs when a tank containing
25 pressurized liquid fails suddenly and produces an explosive effect. During the occurrence of a
26 BLEVE, the liquid inside the tank absorbs energy from the surrounding fire and rapidly heats up,
27 resulting in an increased rate of vaporization that increases pressure. When this pressure exceeds

1 a certain limit (characteristic of the material properties of the tank wall, wall thickness and
2 temperature), the tank fails and the liquid that is released from the tank boils rapidly and
3 expands. If the liquid inside the tank is flammable, it ignites and forms a fireball.

4 Defendants and third party defendants currently do not believe that a BLEVE occurred,
5 and contend that there is a safety relief valve to prevent an explosion if pressure builds inside the
6 cylinder. Defendants and third party defendants believe that the accident occurred as a result of
7 Mr. Shalaby's misuse of the cylinder and torch. Defendants and third party defendants deny that
8 the cylinder had any defects.

9 **2. The Principal Factual Issues Which the Parties Dispute**

10 Discovery is still in its early stages. The parties anticipate further discovery may result in
11 additional factual disputes prior to trial.

12 As of the filing of this joint statement, the parties have the following factual disputes:

13 a. Whether the cylinder or torch were manufactured by any of the parties in this
14 action.

15 b. Defendants and third party defendants contend that Mr. Shalaby intentionally or
16 unintentionally caused the torch and MAPP gas cylinder at issue to come in contact with a
17 campfire in the moments preceding the incident. Plaintiffs deny this contention, and deny that
18 either the torch or cylinder ever came into contact with the campfire at any time prior to the
19 incident.

20 c. Defendants and third party defendants contend that Mr. Shalaby hit or struck the
21 MAPP gas cylinder or torch at issue against a concrete fire ring or otherwise misused the torch or
22 cylinder. Plaintiffs deny that Mr. Shalaby ever hit or struck the cylinder or torch against any
23 surface prior to the incident, or that he misused them in any way.

24 **3. The Principal Legal Issues Which the Parties Dispute**

25 The parties reasonably anticipate that they may have one or more disputes regarding the
26 following legal issues:
27
28

- 1 a. Whether or not the any of the products at issue in this case contained a
2 manufacturing defect when it left defendants' possession.
- 3 b. Whether or not Plaintiffs can make a prima facie showing of defect
4 without the actual products available for examination and inspection by all parties and experts.
- 5 c. Whether or not the products at issue in this case, or any of their
6 components, contained one or more design defects.
- 7 d. Whether or not any defect in any of the products was present at the time it
8 left the custody and control of any parties in this action.
- 9 e. Whether or not Mr. Shalaby's injuries at issue in this case were
10 proximately caused, in whole or in part, by a defective or unsafe condition in one or more of the
11 products.
- 12 f. Whether or not Mr. Shalaby's injuries were proximately caused, in whole
13 or in part, by a misuse of one or more of the products.
- 14 g. Whether or not Mr. Shalaby was using the products in a safe and/or
15 intended and foreseeable manner.
- 16 h. Whether or not the products at issue in this case had adequate instructions
17 or warnings that addressed the potential risks and factors in using the product which plaintiffs
18 contend proximately caused Mr. Shalaby's injuries.
- 19 i. Whether or not Irwin, or either of the two third party defendants, has any
20 liability for plaintiffs' injuries and, if so, whether Irwin and one or both of the third party
21 defendants are jointly and severally liable for plaintiffs' injuries.
- 22 j. Whether or not Irwin or one of its vendors, suppliers and/or subcontractors
23 was negligent in manufacturing and/or designing the products or component parts.
- 24 k. Whether or not the products performed as safely as an ordinary consumer
25 would have expected it to perform when used in the manner that Mr. Shalaby used it at the time
26 of the incident.
- 27 l. Whether or not Mr. Shalaby's claimed injuries and damages in this case,
28 or some of them, were proximately caused by the incident.

1 m. Whether or not the products were of the quality that a reasonable buyer
2 would expect, or was fit for the ordinary purposes for which similar or like-kind products are
3 typically used.

4 n. Whether or not Irwin and/or the third party defendants can make a prima
5 facie showing that the products conformed with generally accepted design, manufacturing, and
6 safety standards and regulations in existence at the time of the incident, and if so, what the
7 relevance and weight of that evidence is as to the issue of whether the products contained a
8 design and/or manufacturing defect.

9 o. Whether Mr. Shalaby was negligent in his use of the products thereby
10 barring or reducing his recovery, if any.

11 4. **The Other Factual Issues (e.g. Service of Process, Personal Jurisdiction,
12 Subject Matter Jurisdiction, or Venue) Which Remain Unresolved**

13 None.

14 5. **The Parties Which Have Not Been Served and the Reasons**

15 All named defendants and third party defendants have been served.

16 6. **The Additional Parties To Be Joined**

17 None at this time.

18 **ALTERNATIVE DISPUTE RESOLUTION**

19 7. **The Following Parties Consent to Assignment of this Case to a United States
Magistrate Judge**

20 None.

21 8. **ADR**

22 The parties agree to submit the case to mediation before a private mediator who has yet to
23 be selected.

24 **DISCLOSURES**

25 Plaintiffs and Irwin certify that they have made the disclosures that are required of them
26 by F.R. Civ. P. 26(a)(1) and Civil L.R. 16-9. The parties have stipulated that Western and
27 Worthington have until September 28, 2007 to make the disclosures that are required of them by
28 F.R. Civ. P. 26(a)(1) and Civil L.R. 16-9, and certify that they will do so by that date.

DISCOVERY

The parties agree to the following discovery plan, exclusive of expert discovery:

- a. Interrogatories. Each party may propound up to 35 interrogatories.
 - b. Requests for Documents and Things. Each party may propound up to 35 requests for production of documents and things.
 - c. Depositions. Each party may take up to 15 depositions of percipient witnesses and retained expert witnesses.
 - d. Third Party Subpoenas. In addition to any deposition subpoenas, each party may propound up to 15 third party subpoenas for purposes of inspection and producing documents and things, including, but not limited to, entry onto land to inspect the accident site.

e. Defendants request that Plaintiffs be required to disclose and produce for deposition their experts, prior to Defendants having to disclose their experts. This proposal is based on defendants' view that plaintiffs have not put forth a specific theory of what was defective and what caused the accident. Defendants believe it would be unfair and unduly prejudicial to them if they were required to retain an expert without knowing plaintiffs' theory of liability. Plaintiffs believe that it would be unfair and unduly prejudicial to them if they were required to disclose and produce their experts before defendant, and request that expert disclosure by simultaneous.

The parties will need to complete some basic discovery prior to mediation, but do not anticipate that they will be able to complete all necessary discovery before mediation. Plaintiffs believe that the parties will be able to complete non-expert discovery by January 31, 2008, barring unforeseen difficulties. Defendants anticipate that they will be able to complete their non-expert discovery by April 30, 2008, barring unforeseen difficulties.

TRIAL SCHEDULE

Plaintiffs request a trial date in April 2008. Defendants request a trial date in September 2008. The parties estimate that the trial will last between five to seven court days.

SIGNATURE AND CERTIFICATION BY PARTIES AND LEAD TRIAL COUNSEL

Pursuant to Civil L.R. 16-12, each of the undersigned certifies that he or she has read the brochure entitled "Dispute Resolution Procedures in the Northern District of California," discussed the available dispute resolution options provided by the court and private entities and has considered whether this case might benefit from any of the available dispute resolution options.

7

8 Dated: September 21, 2007

KELLER, PRICE & MOORHEAD

9

/s/

10

By:

J. PHILLIP MOORHEAD

11

Attorneys for Defendants IRWIN INDUSTRIAL
TOOL COMPANY, INC. and THE HOME DEPOT, INC.

12

13 Date: September 21, 2007

ALBORG, VEILUVA & EPSTEIN LLP

14

/s/

15

By:

MARK D. EPSTEIN

16

Attorneys for Plaintiffs

17

Dated: September 21, 2007

BOWLES & VERNA LLP

18

/s/

19

By:

RICHARD A. ERGO

20

Attorneys for Third Party Defendant
WORTHINGTON INDUSTRIES, INC.

21

Dated: September 21, 2007

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

22

/s/

23

By:

LOWELL T. CARRUTH

24

Attorneys for Third Party Defendant
WESTERN INDUSTRIES, INC.

25

26

27

28

CASE MANAGEMENT ORDER

1 The Case Management Statement and Proposed Order is hereby adopted by the Court as
2 the Case Management Order for the case and the parties are ordered to comply with this Order.

3 In addition, the Court orders:

8 Dated: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANDREW SHALABY and SONIA DUNN-RUIZ.

No. C-06-7026 MJJ

Plaintiffs,

Clerk's Notice

v.

**IRWIN INDUSTRIAL TOOL COMPANY, INC.,
et al.,**

Defendants,

AND RELATED THIRD PARTY CLAIMS

(Plaintiff is required to serve, and file proof of service with the Court, any party involved not listed on the attached proof of service.)

YOU ARE NOTIFIED THAT the Court has rescheduled the Case Management Conference on October 2, 2007 at 2:00 p.m. to **Tuesday, November 13, 2007 at 1:45 p.m.** to be conducted **telephonically** before the Honorable Martin J. Jenkins. Counsel for Third Party Defendant, Worthington Industries, shall initiate a joint teleconference with all counsel and thereafter call (415) 522-4141. A joint statement from the parties is due ten (10) days prior to the conference.

Dated: 09/26/07

FOR THE COURT,

Richard W. Wieking, Clerk

By: R.B. Espinosa
R.B. Espinosa
Courtroom Deputy

Please refer to Judge Jenkins' Standing Order located at www.cand.uscourts.gov for additional information. Pursuant to the Standing Order, the rescheduling of a hearing date for a motion does not change the date on which an opposition brief or reply brief is due; any opposition brief remains due not less than 21 days prior to the date of the *originally noticed* hearing and any reply brief is due not less than 14 days prior to the *originally noticed* hearing date.

26

27

28

Case 3:06-cv-07026-MJJ Document 72 Filed 09/28/2007 Page 1 of 2

1 RICHARD A. ERGO (# 110487)
2 CATHLEEN S. HUANG (#219554)
3 BOWLES & VERNA LLP
4 2121 N. California Boulevard, Suite 875
5 Walnut Creek, California 94596
Telephone: (925) 935-3300
Facsimile: (925) 935-0371
Email: raergo@bowlesverna.com
chuang@bowlesverna.com

**6 Attorneys for Third Party Defendant
Worthington Industries, Inc.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 ANDREW SHALABY, an individual, and SONIA
12 DUNN-RUIZ an individual.

CASE NO.: C06-07026 M.J.J.

Judge Martin J. Jenkins

**ADR CERTIFICATION BY
WORTHINGTON INDUSTRIES, INC. AND
ITS COUNSEL**

5 IRWIN INDUSTRIAL TOOL COMPANY, THE
HOME DEPOT, INC., and DOES 2 through 100,
6 inclusive.

7 Defendants.

BERNZOMATIC

Third Party Plaintiff.

vs.

WESTERN INDUSTRIES, INC.,
WORTHINGTON INDUSTRIES, AND ROES 2
through 100, inclusive.

Third Party Defendants.

Pursuant to Civil L.R. 16-8(b) and ADR L.R. 3-5(b), each of the undersigned certifies that he or she has:

CASE NO.: C06-07026 MJJ

1

ADR CERTIFICATION BY WORTHINGTON INDUSTRIES, INC. AND ITS COUNSEL

Case 3:06-cv-07026-MJJ Document 72 Filed 09/28/2007 Page 2 of 2

1 1. Read the handbook entitled "Dispute Resolution Procedures in the Northern District of
2 California" on the ADR Internet site www.adr.cand.uscourts.gov; <http://www.adr.cand.uscourts.gov>.

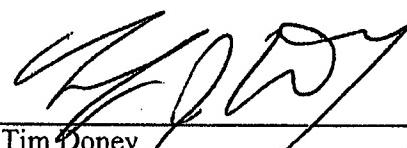
3 2. Discussed the available dispute resolution options provided by the Court and private
4 entities; and

5 3. Considered whether their case might benefit from any of the available dispute resolution
6 options.

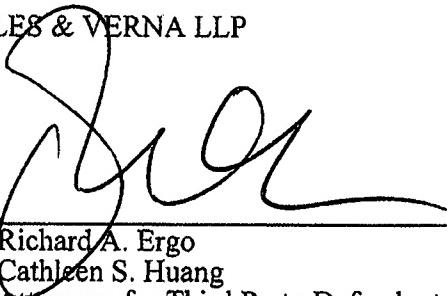
7
8
9 Dated: September 21, 2007

WORTHINGTON INDUSTRIES, INC.

10
11 By:

12 
13 Tim Doney
14 In-House Counsel for Third Party Defendant
WORTHINGTON INDUSTRIES, INC.
15

16
17 Dated: September 27, 2007

18 BOWLES & Verna LLP
19
20 By:
21 
22 Richard A. Ergo
Cathleen S. Huang
23 Attorneys for Third Party Defendant
WORTHINGTON INDUSTRIES, INC.
24
25
26
27
28

CASE NO.: C06-07026 MJJ

2

ADR CERTIFICATION BY WORTHINGTON INDUSTRIES, INC. AND ITS COUNSEL

1 MICHAEL J. VEILUVA (State Bar No. 100419,
2 MARK D. EPSTEIN (State Bar No. 168221,
3 ALBORG, VEILUVA & EPSTEIN LLP
4 200 Pringle Avenue, Suite 410
Walnut Creek, CA 94596
Telephone: (925, 939-9880
Facsimile: (925, 939-9915

5 Attorneys for Plaintiffs
Andrew Shalaby and Sonia Dunn-Ruiz

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

10 ANDREW SHALABY and SONIA DUNN-
11 RUIZ,

12 Plaintiffs,

12 |

VS.

14 IRWIN INDUSTRIAL TOOL COMPANY,
15 INC., THE HOME DEPOT, INC., and DOES
2 through 100, inclusive

16 | Defendants.

Case No. C 06-07026 MJJ

**PLAINTIFFS' ADMINISTRATIVE
MOTION PURSUANT TO CIVIL LOCAL
RULE 7-11 FOR LEAVE TO FILE
OBJECTIONS TO EVIDENCE PROFFERED
WITH THE REPLY PAPERS IN SUPPORT
OF WORTHINGTON INDUSTRIES, INC.'S
MOTION TO TRANSFER VENUE**

Judge: The Honorable Martin J. Jenkins

Complaint filed: October 10, 2006

Case Removed: November 9, 2006

AND RELATED THIRD PARTY CLAIMS

19 Plaintiffs Andrew Shalaby and Sonia Dunn-Ruiz respectfully submit this administrative
20 motion, pursuant to Civil Local Rule 7-11, for leave to file objections to evidence that was
21 submitted and proffered by third party defendant Worthington Industries, Inc. (“Worthington”,
22 for the first time in connection with its reply brief in support of Worthington’s motion to transfer
23 venue, which is now scheduled for hearing on October 16, 2007. Plaintiffs have attached their
24 proposed objections as Exhibit A to the Declaration of Mark D. Epstein in support of this
25 administrative motion.

26 There is good cause to grant this administrative motion because Worthington has
27 proffered new declarations with its reply brief in support of its motion to transfer venue which

1 contain numerous statements that are untrustworthy and inadmissible, that would be unduly
2 prejudicial to plaintiffs if they were to be admitted. Because these declarations were submitted
3 for the first time with Worthington's reply brief, plaintiffs are unable to submit written
4 objections to this evidence without first obtaining leave of court, per the Court's local rules and
5 the Standing Order of the Honorable Martin J. Jenkins. Plaintiffs should be permitted under
6 fundamental notions of fairness and efficiency to submit written objections to Worthington's
7 newly submitted evidence in advance of the hearing. In Provenz v. Miller, 102 F.3d 1478, 1483
8 (9th Cir. 1996,, the court held that it would be "unfair" to allow moving parties to submit new
9 evidence in connection with their reply papers without affording the non-moving parties an
10 opportunity to respond. See also Pfohl v. Farmers Ins. Group, 2004 U.S. Dist. LEXIS 6447 at *4
11 n.1 (C.D. Cal. March 1, 2004, (defendant permitted to file sur-reply where plaintiff submitted
12 new evidence and raised new argument in reply,; Hammett v. Am. Banker's Ins. Co., 203 F.R.D.
13 690, 695 n.1 (S.D. Fla. 2001, (same,.

14
15 Accordingly, plaintiffs respectfully request that they be granted leave to file their
16 objections to submitted with Worthington's reply papers in support of its motion to transfer
17 venue.
18

19 DATED: October 4, 2007

20 ALBORG, VEILUVA & EPSTEIN, LLP

21 /s/ Mark D. Epstein
22 By: _____
23 MARK D. EPSTEIN
24 Attorneys for Plaintiffs ANDREW SHALABY and
25 SONIA DUNN-RUIZ
26
27
28

1 MICHAEL J. VEILUVA (State Bar No. 100419)
2 MARK D. EPSTEIN (State Bar No. 168221)
3 ALBORG, VEILUVA & EPSTEIN LLP
4 200 Pringle Avenue, Suite 410
Walnut Creek, CA 94596
Telephone: (925) 939-9880
Facsimile: (925) 939-9915

5 Attorneys for Plaintiffs
- Andrew Shalaby and Sonia Dunn-Ruiz

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 ANDREW SHALABY and SONIA DUNN-
11 RUIZ,

12 | Plaintiffs,

13 | VS.

14 IRWIN INDUSTRIAL TOOL COMPANY,
15 INC., THE HOME DEPOT, INC., and DOES
2 through 100, inclusive

16 | Defendants.

Case No. C 06-07026 MJJ

DECLARATION OF MARK D. EPSTEIN IN
SUPPORT OF PLAINTIFFS'
ADMINISTRATIVE MOTION PURSUANT
TO CIVIL LOCAL RULE 7-11 FOR
LEAVE TO FILE OBJECTIONS TO
EVIDENCE PROFFERED WITH THE
REPLY PAPERS IN SUPPORT OF
WORthington INDUSTRIES, INC.'S
MOTION TO TRANSFER VENUE

Judge: The Honorable Martin J. Jenkins

Complaint filed: October 10, 2006
Case Removed: November 9, 2006

AND RELATED THIRD PARTY CLAIMS

19 I, MARK D. EPSTEIN, declare as follows:

1. I am an attorney at law, duly licensed to practice before the courts of the State of California, and am admitted to practice before the United States District Court for the Northern District of California. I am a partner in the law firm of Alborg, Veiluva & Epstein, LLP, counsel of record for plaintiffs in this action. I make the following statements based upon matters that are within my personal knowledge, unless otherwise stated on information and belief. If called as a witness, I could and would testify competently regarding the matters set forth below.

26 2. I received service of the declarations of Steven T. Gentry and Joseph Tancredy in
27 support of third party defendant Worthington Industries, Inc.'s ("Worthington's") motion to

1 transfer venue (Docket Nos. 64 and 65) for the first time, via the Court's CM-ECF System, on
2 September 11, 2007, in conjunction with Worthington's reply brief in support of the motion.

3. Attached hereto as Exhibit A is a true and correct copy of the set of objections to
4 the declarations of Steven T. Gentry and Joseph Tancredy that plaintiffs are seeking leave to file.

5 I declare under penalty of perjury that the foregoing is true and correct. Executed on
6 October 4, 2007 in Walnut Creek, California.

7 /s/ Mark D. Epstein
8

9 MARK D. EPSTEIN
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 MICHAEL J. VEILUVA (State Bar No. 100419)
2 MARK D. EPSTEIN (State Bar No. 168221)
3 ALBORG, VEILUVA & EPSTEIN LLP
4 200 Pringle Avenue, Suite 410
Walnut Creek, CA 94596
Telephone: (925) 939-9880
Facsimile: (925) 939-9915

5 Attorneys for Plaintiffs
1 Andrew Shalaby and Sonia Dunn-Ruiz

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 ANDREW SHALABY and SONIA DUNN-
11 RUIZ,

Case No. C 06-07026 MJJ

12 | Plaintiffs.

**PLAINTIFFS' OBJECTIONS TO
EVIDENCE PROFFERED WITH THE
REPLY PAPERS IN SUPPORT OF
WORTHINGTON INDUSTRIES, INC.'S
MOTION TO TRANSFER VENUE**

14 IRWIN INDUSTRIAL TOOL COMPANY,
15 INC., THE HOME DEPOT, INC., and DOES
2 through 100, inclusive

Date: October 16, 2007

Date: October 1

Ctrm: 11, 19th Floor

Judge: The Honorable Martin J. Jenkins

17 AND RELATED THIRD PARTY CLAIMS

Complaint filed: October 10, 2006
Case Removed: November 9, 2006

19 Plaintiffs Andrew Shalaby and Sonia Dunn-Ruiz hereby object to the following evidence
20 submitted and proffered by third party defendant Worthington Industries, Inc. in connection with
21 its reply brief in support of Worthington's motion to transfer venue, currently set for hearing on
22 October 16, 2007.

1. Objections to the Declaration of Steven T. Gentry

Plaintiffs object to the Declaration of Steven T. Gentry in support of Worthington's reply brief to its motion to transfer venue as follows:

a. The declaration as a whole is irrelevant to any issue on this motion.

Evidence which is not relevant is not admissible. Fed. R. Evid. 402. Relevant evidence

1 means evidence having any tendency to make the existence of any fact that is of consequence to
2 the determination of the action, or in this case the motion, more probable or less probable than it
3 would be without the evidence. The issues on this motion are (1) whether the witnesses who
4 reside in San Diego, for whose convenience Worthington purports to make this motion, have
5 testimony that is of sufficient relative importance vis-à-vis the testimony of the witnesses who
6 reside in Northern California, and is of sufficient reliability and probative value (and in some
7 cases whether it is even admissible), to justify overriding plaintiffs' choice of forum and
8 transferring the case to the Southern District of California, and (2) whether on balance the more
9 critical witnesses in the case reside in Northern California as opposed to Southern California.

10 None of the statements contained in this declaration, which are all unfounded,
11 unsubstantiated, and self-serving statements of opinion by Worthington's own Regulatory
12 Affairs Manager, has any impact on the admissibility, reliability and/or probative value on the
13 testimony of the third party witnesses that serves as the basis of Worthington's motion to transfer
14 venue. Nor do any of the statements in this declaration have any impact on the relative
15 importance of the testimony of the Northern California witnesses vis-à-vis the testimony of the
16 Southern California witnesses on whose behalf Worthington makes this motion. Moreover,
17 there are no allegations in the complaint about when or where a hole may have developed in the
18 MAPP gas cylinder at issue, which is the primary focus of Mr. Gentry's declaration.

19 Accordingly, the declaration of Steven T. Gentry should be disregarded in its entirety on
20 the grounds that it is irrelevant to any issue in this motion.

21 b. The Statements in Paragraph 3, Lines 11-16 Are Not Based on Matters
22 That Are Within the Declarant's Personal Knowledge and Contain
23 Inadmissible Opinions.

24 Statements Objected To:

25 "MAPP gas cylinders contain gas that is under pressure. If there was a hole at the
26 top of the cylinder, that would have allowed gas to escape from the cylinder. The
27 sound of the gas escaping would be very audible and very obvious to anyone
28 handling the cylinder or in the vicinity of the cylinder. As I am not aware that any
witness heard the sound of gas escaping before the accident occurred, it seems
fairly evident that the hole was not created prior to the accident that caused Mr.

1 Shalaby's injuries."

2 Objections:

3 (1) Mr. Gentry's statements and opinions expressed in this paragraph are inadmissible
4 because they are not based upon matters that are within his personal knowledge. A witness may
5 not testify to a matter unless evidence is introduced sufficient to support a finding that the
6 witness has personal knowledge of the matter. Fed. R. Evid. 602. Evidence to prove personal
7 knowledge may consist of, among other things, the witness' own testimony. *Ibid.* Mr. Gentry's
8 superficial and conclusory statement in paragraph 1 that, "I have personal knowledge of the
9 following matters," is insufficient to establish that he actually has personal knowledge of facts
10 upon which he bases the statements that follow.

11 It is not enough for the declarant simply to state that he or she has personal knowledge of
12 the facts stated, as Mr. Gentry has done. Rather, the declaration itself must contain facts
13 showing the declarant's connection with the matters stated therein, establishing the source of his
14 or her information. Fed. R. Evid. 602; see United States v. Shumway, 199 F.3d 1093, 1104 (9th
15 Cir. 1999); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1412 (9th Cir. 1995). Indeed, other
16 statements in Mr. Gentry's declaration contradict his statement in paragraph 1 that he has
17 "personal knowledge" of the matters stated therein, and make clear that he in fact does not have
18 personal knowledge of the facts upon which he bases his statement, opinions and conclusions.

19 For example, Mr. Gentry begins paragraph 2 by declaring, "It is my understanding that
20 the MAPP gas cylinder involved in this accident..." and, "It is also my understanding that the
21 campground employees observed a hole..." without stating *what* it is upon which he bases his
22 understanding. Moreover, Mr. Gentry's statement in paragraph 3, to which this objection
23 specifically pertains, makes clear that the opinions expressed therein are uncertain, unreliable,
24 and not based upon matters that are within her personal knowledge, i.e., "...it seems fairly
25 evident that the hole was not created prior to the accident (emphasis added)...." Accordingly,
26 the statements in paragraph 3 are inadmissible.

27

28

11 c. The Statements in Paragraph 4, Lines 17-19 Are Not Based on Matters
12 That Are Within the Declarant's Personal Knowledge and Contain
 Inadmissible Opinions.

Statements Objected To:

15 "The MAPP gas cylinder walls would not breach in the manner described by the
16 campground employees unless subjected to striking force or localized heat
impingement. A breach would not occur when a person simply attempted to
ignite a torch that was attached to a MAPP gas cylinder."

Objections:

18 (1) Mr. Gentry statements and opinions expressed in this paragraph are inadmissible
19 because they are not based upon matters that are within his personal knowledge. Mr. Getry does
20 not give the names of the campgrounds employees upon whose descriptions of the "MAPP gas
21 cylinder walls breach" he relies, nor does Mr. Gentry describe the information that he received
22 from the employees, if any, or whether he personally interviewed the employees, reviewed
23 transcripts of their deposition testimony, or relied on a hearsay account of their statements as
24 relayed to him by a third party. As such, there is nothing in the declaration to establish that Mr.
25 Gentry has personal knowledge of the matter addressed in this paragraph, and his statements in
26 this paragraph are therefore inadmissible. Fed. R. Evid. 602.

13 | Statements Objected To:

14 "It is my understanding that one or more persons at the scene of the accident
15 heard Mr. Shalaby say that he kicked the cylinder into the fire. That scenario very
16 well could account for the hole in the cylinder observed after the accident. If the
17 cylinder was in the fire and a flame or ember impinged on the top of the cylinder,
18 the cylinder wall at the point of impingement would weaken. The fire would
19 cause the temperature of the MAPP gas to increase; that in turn would cause the
pressure inside the cylinder to increase. It is possible that the cylinder wall at the
point of impingement would weaken to the point where the increased pressure
would cause a breach."

Objections:

28 | Fed. R. Evid. 602.

2. Objection to the Declaration of Joseph Tancredy

12 Plaintiffs object to the Declaration of Joseph Tancredy on the grounds that it is irrelevant
13 to any issue on this motion.

14 Evidence which is not relevant is not admissible. Fed. R. Evid. 402. Relevant evidence
15 means evidence having any tendency to make the existence of any fact that is of consequence to
16 the determination of the action, or in this case the motion, more probable or less probable than it
17 would be without the evidence.

18 Worthington has the burden on this motion of establishing that "the convenience of the
19 parties and witnesses, and that the interests of justice" require that this case be transferred to the
20 Southern District of California. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270,
21 279 (9th Cir. 1979); Los Angeles Memorial Coliseum Comm'n v. NFL, 89 F.R.D. 497, 499 (CD
22 Cal. 1981). The pertinent issues on this motion are (1) whether the witnesses who reside in San
23 Diego, for whose convenience Worthington purports to make this motion, have testimony that is
24 of sufficient relative importance vis-à-vis the testimony of the witnesses who reside in Northern
25 California, and is of sufficient reliability and probative value (and in some cases whether it is
26 even admissible), to justify overriding plaintiffs' choice of forum and transferring the case to the

1 Southern District of California, and (2) whether on balance the more critical witnesses in the case
2 reside in Northern California as opposed to Southern California.

3 Mr. Tancredy is a resident of Northern California, and thus it certainly would not be in
4 the interest of his convenience to transfer this case to Southern California. The fact that Mr.
5 Tancredy may be willing to *inconvenience* himself by traveling to San Diego for trial is entirely
6 beside the point, and does not provide any grounds on which to grant this motion.

7 Accordingly, the declaration of Joseph Tancredy should be disregarded in its entirety on
8 the grounds that it is irrelevant to any issue in this motion.

9

10

11

DATED: October 4, 2007

ALBORG, VEILUVA & EPSTEIN, LLP

12

13

/s/ Mark D. Epstein

By: _____

MARK D. EPSTEIN

Attorneys for Plaintiffs ANDREW SHALABY and
SONIA DUNN-RUIZ

16

17

18

19

20

21

22

23

24

25

26

27

28

1 MICHAEL J. VEILUVA (State Bar No. 100419)
2 MARK D. EPSTEIN (State Bar No. 168221)
3 ALBORG, VEILUVA & EPSTEIN LLP
4 200 Pringle Avenue, Suite 410
Walnut Creek, CA 94596
Telephone: (925) 939-9880
Facsimile: (925) 939-9915

5 Attorneys for Plaintiffs
6 Andrew Shalaby and Sonia Dunn-Ruiz

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 ANDREW SHALABY and SONIA DUNN-
11 RUIZ,

12 Plaintiffs,

13 |

vs.

14 IRWIN INDUSTRIAL TOOL COMPANY,
15 INC., THE HOME DEPOT, INC., and DOES
2 through 100, inclusive

16 | Defendants.

Case No. C 06-07026 MJJ

[PROPOSED] ORDER GRANTING
PLAINTIFFS' ADMINISTRATIVE
MOTION PURSUANT TO CIVIL LOCAL
RULE 7-11 FOR LEAVE TO FILE
OBJECTIONS TO EVIDENCE PROFFERED
WITH THE REPLY PAPERS IN SUPPORT
OF WORTHINGTON INDUSTRIES, INC.'S
MOTION TO TRANSFER VENUE

Judge: The Honorable Martin J. Jenkins

**Complaint filed: October 10, 2006
Case Removed: November 9, 2006**

Having duly considered plaintiffs Administrative Motion Pursuant to Civil Local Rule 7-
11 for Leave to File Objections to Evidence Proffered With the Reply Papers In Support of
Worthington Industries, Inc.'s Motion to Transfer Venue, the supporting papers, declarations,
and the arguments in support of and in opposition thereto, IT IS HEREBY ORDERED that the
Motion is GRANTED. Plaintiffs shall electronically file the objections that are attached as
Exhibit A to the Declaration of Mark D. Epstein in support of plaintiffs' Administrative Motion.

IT IS SO ORDERED.

26 | Dated: _____

**The Honorable Martin J. Jenkins
United States District Court Judge**

1 Lowell T. Carruth, # 034065
 2 McCormick, Barstow, Sheppard,
 3 Wayte & Carruth LLP
 4 P.O. Box 28912
 5 5 River Park Place East
 6 Fresno, CA 93720-1501
 Telephone: (559) 433-1300
 Facsimile: (559) 433-2300
 Email: lowell.carruth@mccormickbarstow.com

(SPACE BELOW FOR FILING STAMP ONLY)

6 Attorneys for Third-Party Defendant
 WESTERN INDUSTRIES, INC.

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

10
 11 ANDREW SHALABY, an individual, and
 SONIA DUNN-RUIZ, an individual,

12 Plaintiffs,

13 v.

14 IRWIN INDUSTRIAL TOOL
 COMPANY, THE HOME DEPOT, INC.,
 15 and DOES 2 through 100, inclusive,

16 Defendants.

17
 18 AND RELATED ACTIONS.

Case No. CV 06-07026 MJJ

**NOTICE IN SUPPORT OF THIRD PARTY
 DEFENDANT WORTHINGTON
 INDUSTRIES, INC.'S MOTION TO
 TRANSFER VENUE**

Judge: Martin J. Jenkins
 Date: October 16, 2007
 Time: 9:30 a.m.
 Courtroom: 11, 19th Floor

20 PLEASE TAKE NOTICE that Third Party Defendant WESTERN INDUSTRIES, INC.,
 21 supports Third Party Defendant WORTHINGTON INDUSTRIES, INC.'S Motion to Transfer
 22 Venue.

23 Dated: October 5, 2007

McCORMICK, BARSTOW, SHEPPARD,
 WAYTE & CARRUTH LLP

25 By: /s/ Lowell T. Carruth
 26 Lowell T. Carruth
 27 Attorneys for Third-Party Defendant
 28 WESTERN INDUSTRIES, INC.

03664/00161-1146992.v1

 NOTICE IN SUPPORT OF MOTION TO TRANSFER VENUE

CV 06-07026 MJJ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT of CALIFORNIA

CIVIL MINUTES

Judge: MARTIN J. JENKINS

Date: October 16, 2007

Case No: C 06-07026 MJJ

Case Title: ANDREW SHALABY, et al. v. NEWELL RUBBERMAID, INC., et al.

Appearances:

For Plaintiff(s): Mark Epstein

For Defendant(s): Phillip Moorehead, Richard Ergo, Lowell Carruth

Deputy Clerk: Rowena B. Espinosa

Court Reporter: Lydia Zinn

PROCEEDINGS

1. Hearing on the Motion to Transfer Venue - held

MOTION/MATTER: (X) Granted

- () Denied
- () Granted in part/Denied in part
- () Taken under submission
- () Withdrawn/Off Calendar
- () Continued to:

Order to be prepared by: () Plaintiff () Defendant (X) Court

UNITED STATES DISTRICT COURT
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

www.cand.uscourts.gov

Richard W. Wieking
Clerk

General Court Number
415.522.2000

October 25, 2007

Southern District of California
940 Front Street
San Diego, CA 92101

RE: CV 06-07026 MJJ SHALABY ET AL-v-NEWELL RUBBERMAID, INC. ET AL

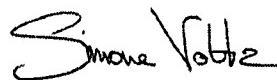
Dear Clerk,

Pursuant to an order transferring the above captioned case to your court, transmitted herewith are:

- Certified copy of docket entries.
- Certified copy of Transferral Order.
- Original case file documents.
- Please access the electronic case file for additional pleadings you may need. See the attached instructions for details.

Please acknowledge receipt of the above documents on the attached copy of this letter.

Sincerely,
RICHARD W. WIEKING, Clerk



by: Simone Voltz
Case Systems Administrator

Enclosures
Copies to counsel of record

FILED

JS44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Andrew Shalaby, Sonia Dunn-Ruiz

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Alameda
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

OCT 30 2007
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

Newell Rubbermaid, Inc, The Home Depot, Inc
Rubbermaid, Inc. Irwin Industrial Tool Company

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Mark Douglas Epstein
200 Pringle Avenue, Suite 410
Walnut Creek, CA 94596
925-939-9880

ATTORNEYS (IF KNOWN)

'07 CV 2107 W POR

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- | | |
|--|---|
| <input type="checkbox"/> 1 U.S. Government Plaintiff | <input type="checkbox"/> 3 Federal Question
(U.S. Government Not a Party) |
| <input type="checkbox"/> 2 U.S. Government Defendant | <input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III) |

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX)

(For Diversity Cases Only) FOR PLAINTIFF AND ONE BOX FOR DEFENDANT

	PT	DEF	PT	DEF
Citizen of This State	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4 <input type="checkbox"/>
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5 <input checked="" type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/>

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 1441

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 400 State Reappointment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury-Medical Malpractice	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input checked="" type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 421 Withdrawal 28 USC 157	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	PROPERTY RIGHTS	<input type="checkbox"/> 450 Commerce/ICC Rates/etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	SOCIAL SECURITY	<input type="checkbox"/> 850 Securities/Commodities Exchange
<input type="checkbox"/> 160 Stockholders Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability		<input type="checkbox"/> 861 HIA (13958)	<input type="checkbox"/> 875 Customer Challenge 12 USC
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 863 DIWC/DIWV (405(g))	<input type="checkbox"/> 892 Economic Stabilization Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	<input type="checkbox"/> 864 SSID Title XVI
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 530 General	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 240 Tort to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 290 All Other Real Property		<input type="checkbox"/> 555 Prisoner Conditions	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 950 Constitutionality of State
				<input type="checkbox"/> 871 IRS - Third Party 26 USC 7609
				<input type="checkbox"/> 890 Other Statutory Actions
FEDERAL TAX SUITS				

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

- 1 Original Proceeding 2 Removal from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) Northern district of CA 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE

Docket Number

DATE October 30, 2007

SIGNATURE OF ATTORNEY OF RECORD